No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1955

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

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CASES CITED

346716—55——1

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STATEMENT AS TO JURISDICTION

The Interstate Commerce Commission, appellant, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at 128 F. Supp. 374, and a copy is attached hereto as Appendix A. A copy of the final judgment of the District Court is attached hereto as Appendix

B. The decision of the Interstate Commerce Commission is reported at 52 M. C. C. 511. A copy of the Commission's order entered in conformity with its decision is attached hereto as Appendix C.

BASIS OF JURISDICTION

This suit was brought by Frozen Food Express, a motor common carrier of property, to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The judgment of the District Court was entered on February 25, 1955, and notice of appeal was filed in that court by the Commission on April 20, 1955.

The jurisdiction of the Supreme Court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *American Trucking Assns.* v. *United States,* 344 U. S. 298; *United States* v. *Capital Transit Co.,* 338 U. S. 286.

STATUTES INVOLVED

The pertinent portions of Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq., are as follows:

Sec. 203 (b) (6), 49 U. S. C. 393 (b) (6):

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees

and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities* (*not including manufactured products thereof*), if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

Sec. 206 (a), 49 U. S. C. 306 (a): * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

QUESTION PRESENTED

The only question presented by this appeal is whether the District Court was in error in holding that the order of the Interstate Commerce Commission assailed by the plaintiff was not an order subject to judicial review in a suit of this type.

STATEMENT OF THE CASE

In June 1948 the Commission instituted an investigation[1] into and concerning the meaning of

[1] Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, hereinafter sometimes referred to as "the Determination case."

the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act, 49 U. S. C. 303 (b) (6). By the terms of that section, which is copied on page 2 hereof, motor vehicles used in carrying such "agricultural commodities" are exempted from the provisions of the Act requiring a motor carrier engaged in interstate transportation for compensation to have operating authority,[2] to publish and file rates,[3] and to keep in force and on file with the Commission insurance[4] for the protection of shippers and the general public. The result is that if a motor carrier is engaged in the transportation of "agricultural commodities" only, he is not required to comply with the authority, rate, and insurance provisions; but he is required to comply with them if he transports "manufactured products" of agricultural commodities.

Following a nine-day hearing,[5] participated in by representatives of the Secretary of Agriculture, numerous State officials, various associations of producers and shippers, and many individual motor carriers, and after submission of the examiner's recommended report, the filing and consideration of briefs and oral argument, the Com-

[2] Section 206 (a) and 209 (a).

[3] Sections 217 (a) and 218 (a).

[4] Section 215.

[5] The evidence received at the hearing consists of 1509 pages of testimony and 46 exhibits.

mission issued its report (52 M. C. C. 511), dated April 13, 1951. On the same date it entered an order incorporating the report by reference, including the findings and conclusions therein set forth, and then discontinuing the proceeding.

In its report the Commission first determined the meaning of the statutory language, "agricultural commodities (not including manufactured products thereof)", and then made specific findings as to a large number of named commodities and products, specifying as to each of them whether it was found to be an agricultural commodity or a manufactured product of an agricultural commodity. It based its findings on the evidence in the record, as shown by the full discussion thereof set forth in the report.

The complaint filed in the District Court by Frozen Food Express alleges, among other things, that it is a motor common carrier engaged in the for-hire transportation in interstate commerce of certain agricultural commodities [6] which the Commission in the *Determination* case found were manufactured products; also alleging that it required no operating authority for performing said transportation but that the Commission in

[6] The complaint alleged that the commodities being transported included, but were not limited to, slaughtered cattle, fresh meat, meat products, frozen whole eggs, dried egg powder, dried egg yolks, cottage cheese, cream cheese, quick-frozen fruits and vegetables, canned fruits and vegetables (and numerous other named commodities).

the *Determination* case had erroneously held that operating authority was required in order for a motor carrier to transport the named articles, thereby depriving Frozen Food Express of its right under the statute to engage in such transportation without first obtaining authority therefor; also alleging that the Commission was threatening to enjoin Frozen Food Express from engaging in such transportation and was threatening to file complaints against it to enforce the determinations made by the Commission in the *Determination* case. The complaint demanded that the District Court annul the Commission's order and enjoin its enforcement.

The Secretary of Agriculture intervened in the suit in partial support of the position of Frozen Food Express, and in doing so was joined by the Department of Justice. Numerous motor carriers, motor carrier associations, and groups of railroads intervened in support of the Commission's order. All parties (plaintiffs, defendants, and intervenors) were in agreement and urged the District Court to hold that the assailed order was a reviewable order. The Court nevertheless held that the order was not reviewable, and dismissed the complaint, thus refusing to pass upon the Commission's findings and determinations. From that decision separate appeals have been taken by the original plaintiff, Frozen Food Express, by the Commission as a defendant, by the interven-

ing motor carriers, and by the intervening railroads, all of the appellants contending that the order is reviewable and that the District Court was in error in holding otherwise.

THE QUESTION PRESENTED IS SUBSTANTIAL AND IS OF PUBLIC IMPORTANCE

The Commission is appealing from the decision of the District Court and seeking a reversal thereof, notwithstanding the fact that the decision was in a narrow and technical sense in favor of the Commission, in that it resulted in the dismissal of a complaint filed against the Commission. The Commission views the decision in its broader aspect, however, and so viewing it, feels aggrieved by it. It is greatly to the interest of the Commission, in the performance of its statutory duty "to administer, execute, and enforce" all provisions of the statute, 49 U. S. C. 304 (a). (6), that the assailed order and the findings and conclusions incorporated in it be judicially reviewed and either annulled or sustained. Such a judicial review, with a court decision as to the legality of the Commission's numerous findings and determinations as to the commodities which are within and those which are without the statutory exemption, would enable the Commission intelligently and authoritatively to discharge its duties and responsibilities. It would then *know* which commodities and products require operat-

ing authority for their interstate transportation, and which do not; it would know which motor carriers are operating within the scope of their authorities and which are operating without authority and in violation of the statute.

If, on the other hand, the Commission's order, including as it does its findings and conclusions as to the several commodities and products, is not subject to judicial review, the legality of those findings and conclusions can be determined only in piecemeal fashion, in a multitude of separate criminal prosecutions or civil injunctive actions instituted under sections 222 (a) or 222 (b) of the Act, 49 U. S. C. 322 (a) or 322 (b). Examples of such cases are *Southwestern Trading Co.* v. *United States,* 208 F. 2d 708 (involving cowhides); *Interstate Commerce Commission* v. *Yeary,* 104 F. Supp. 245, aff'd., 202 F. 2d 151 (redried tobacco); *Interstate Commerce Commission* v. *Weldon,* 90 F. Supp. 873, aff'd., 188 F. 2d 367, cert. den., 342 U. S. 827 (shelled raw peanuts); *Interstate Commerce Commission* v. *Koblin,* 113 F. Supp. 599, aff'd., 212 F. 2d 555, cert. den., 348 U. S. 836 (dressed poultry).

The avoidance of a multiplicity of suits obviously is to be desired and is of public importance.

The question presented is important to the public, particularly to motor carriers and shippers, for several additional reasons. Carriers such as Frozen Food Express desire to know, and need

to know, what the law requires of them as to obtaining authority to transport the commodities and products passed upon by the Commission in the *Determination* case, in order to comply with the requirements of the statute and thereby avoid the risks of prosecution and injunctive action. Moreover, those motor carriers who, in reliance upon the Commission's decision in the *Determination* case, have understood that operating authority was required for them lawfully to transport certain of the commodities now in question, and who have expended large sums of money in prosecuting applications for and obtaining such authority—those carriers desire to know and need to know whether their operating authorities are valuable or worthless. Others who would now seek operating authority, if authority is required in order to operate lawfully, are likewise entitled to know whether the Commission's findings and determinations are lawful or not. Shippers have a similar interest because they do not desire to risk possible prosecution for using the services of motor carriers operating unlawfully.

As was said by the Court in *Montana-Dakota Utilities Co.* v. *Federal Power Commission*, 169 F. 2d 392, 399, "The whole record here reflects the existence of a dispute and controversy, involving not only factual questions but also questions of law which ought to be determined for the future guidance of the petitioner and of the Commission."

The basis for the District Court's holding that the order in question is not subject to judicial review appears to be that the order "does not command the carrier to do, or to refrain from doing, anything," citing *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299.

The court apparently overlooked the fact that the *Los Angeles* case was decided long before enactment of the Administrative Procedure Act, 5 U. S. C. 1001 et seq., and that "one of the main objectives [of that Act] was to extend the right of judicial review. * * * it broadened the scope of judicial review and it enlarged the class of persons who were given standing to invoke judicial process". *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 349.

The reviewability of the Commission's order appears to be established by the decision of the Supreme Court in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407. In that case the Federal Communications Commission, after investigation, issued a set of rules which it stated it would follow in exercising its licensing power, but which its report characterized as an announcement of policy (316 U. S. 422). CBS brought suit to enjoin the Commission's order, alleging that the Commission did not have authority to issue any such rules and that their enforcement would cause CBS irreparable injury (316 U. S. 408–409). The suit was brought under section

402 (a) of the Communications Act, 47 U. S. C. 402 (a), and the Urgent Deficiencies Act, the latter being the act under which the present suit was brought. The case was heard below by a district court of three judges, which dismissed the complaint for want of jurisdiction (316 U. S. 409). The questions considered by the Supreme Court were "whether the Commission's order is an 'order' review of which is authorized by section 402 (a) of the Act, 47 U. S. C. A., section 402 (a), and if so whether the bill states a cause of action in equity" (316 U. S. 415). The Court answered both questions in the affirmative.

In its discussion of the reviewability of the order the Court stated (316 U. S. 417):

> * * * Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases* (*United States* v. *Berwind-White Coal Min. Co.*), 274 U. S. 564, 71 L. ed. 1204, 47 S. Ct. 727; *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 79 L. ed. 587, 55 S. Ct. 268. And regulations of like character, by which the Communications Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under section 402

(a). *American Teleph. & Teleg. Co.* v. *United States*, 299 U. S. 232, 81 L. ed. 142, 57 S. Ct. 170.

And the Court also said (316 U. S. 419–420):

> The purposes sought to be accomplished by section 402 (a) and the Urgent Deficiencies Act would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell* v. *United States*, 300 U. S. 276, 81 L. ed. 643, 57 S. Ct. 470, *supra*; cf. *American Federation of Labor* v. *National Labor Relations Bd.*, *supra* (308 U. S. 408, 84 L. ed. 351, 60 S. Ct. 300). The *Powell Case* likewise repudiates the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. See also *Western Pacific California R. Co.* v. *Southern P. Co.*, 284 U. S. 47, 76 L. ed. 160, 52 S. Ct. 56; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 76 L. ed. 808, 52 S. Ct. 440.

The Court ended its opinion with the following statement (316 U. S. 425):

> * * * The ultimate test of reviewability is not to be found in an overrefined tech-

> nique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

The *Columbia Broadcasting* case would appear to invalidate the reasoning of the District Court in the present case to the effect that the Commission's order is not reviewable because it "does not command the carrier to do, or refrain from doing, anything." For in the *Columbia* case this Court expressly held that the order there considered was reviewable even though "not in terms addressed to those whose rights are affected" and who seek its review, and "even though not directed to any particular person or corporation," provided the result of the order is to "affect or determine rights generally."

What has been said above should be sufficient to demonstrate that the Commission's order in the instant case, incorporating as it does the findings and conclusions as to a long list of commodities and products, does vitally affect and determine the operating rights of motor carriers generally.

Further support for the view that the Commission's order is reviewable is found in the recent (1954) decision in *Union Producing Co.* v.

Federal Power Commission, 127 F. Supp. 88. There the plaintiff sued to set aside and enjoin enforcement of certain Power Commission orders, contending (as does Frozen Food Express in the instant case) that it was not subject to the Commission's jurisdiction, but that if it should ignore the orders and refuse to comply with them, and if it should later be decided that its position was erroneous and that the statute did apply to its operations, it would have incurred the risk of onerous penalties (a fine of a stated sum per day, similar to the penalties provided in 49 U. S. C. 322 (a) for violations by motor carriers). The Court held, contrary to the Power Commission's contention, that there was a justiciable controversy and that the questioned orders were subject to review. As will be noted, the facts in that case were in striking parallel with those in the instant suit.

The District Court seemed to base its decision also on the fact that the Commission's order "discontinued" the *Determination* proceeding. That fact does not make the order nonreviewable. On the contrary, it is a circumstance which supports the conclusion that the order is reviewable, for the fact that the proceeding was discontinued shows that the Commission had completed its task, i. e., that the order thereby became a final order. This view is supported by *El Dorado Oil Works v. United States*, 328 U. S. 12, 18–19, where this Court said:

Before we reach the merits of the controversy we must at the outset briefly dispose of the jurisdictional question. As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract declaration." "Legal consequences" would follow which would finally fix a "right of obligation" on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Teleph. Corp.* v. *United States*, 307 U. S. 125, 83 L. ed. 1147, 59 S. Ct. 754, held to be reviewable by a district court of three judges. The district court erred in dismissing the complaint for want of jurisdiction.

CONCLUSION

It is submitted, therefore, that the question presented by this appeal is substantial and of general public importance; and that the decision of the District Court is so clearly erroneous as to warrant its summary reversal.

Respectfully submitted.

LEO H. POU,
Associate General Counsel,
Interstate Commerce Commission.

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APPENDIX A

In the District Court of the United States for the Southern District of Texas, Houston Division

Civil Action No. 8285 and Civil Action No. 8396

FROZEN FOOD EXPRESS, PLAINTIFF, EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMISSION, DEFENDANTS, COMMON CARRIER IRREGULAR ROUTE CONFERENCE OF AMERICAN TRUCKING ASSOCIATION, ET AL., INTERVENING DEFENDANTS

January 26, 1955

Before HUTCHESON, *Chief Circuit Judge,* and CONNALLY and KENNERLY, *District Judges*

CONNALLY, *District Judge:*

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305 (g), of Title 49, U. S. C. A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as

later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption (Sec. 303 (b) (6)) of Part II of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 301, et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)," are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)," which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities," or have become "manufactured products thereof." The result of this argument is drastically to restrict the scope of the exemption.

In June 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC–C–968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I. C. C. Reports, Motor Carrier Cases, 511–566). In such report, the Commission announced its definition of such statutory term.[1]

[1] "In No. MC–C–968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203 (b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

which definition it then undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.[2] Thereupon, the proceeding was terminated and removed from the Commission docket.

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[2] "We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been dewawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff." He makes common cause with plaintiff in contending that a number of commodities[3] are within the exemption. Several trucking associations,

[3] "(1) Slaughtered meat animals and fresh meats; (2) dressed and cut-up poultry, fresh or frozen; (3) feathers; (4) raw shelled peanuts and raw shelled nuts; (5) hay chopped up fine; (6) cotton linters and cottonseed hulls; (7) frozen cream, frozen skim milk, and frozen milk; (8) seeds which have been deawned, scarified, or inoculated."

and some sixty southern and western railroad companies, have intervened. These interveners take a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not

> change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation.

The proponents of jurisdiction here rely upon *Columbia Broadcasting System* v. *U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S.* v. *Los Angeles R. R. Co.*, *supra*).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will

have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and has been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.[1]

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plain-

[1] Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

tiff contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof (Sec. 1291 (a), of Title 7, U. S. C. A.); (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.). *U. S.* v. *Pa. R. R. Co.* (242 U. S. 208); *B & O R. R. Co.* v. *U. S.* (277 U. S. 292); *Mo.*

Pac. R. R. Co. v. *Norwood* (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Graven of the United States District Court for the Northern District of Iowa, in *I. C. C.* v. *Kroblin* (113 F. Supp. 599, aff., 212 F. 2d 555, cert. den., Oct. 14, 1954). Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Graven concluded that dressed poultry constituted an "agricultural commodity," and did not constitute a "manufactured product thereof." Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the *Kroblin* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings

are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry", the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. *Baumgartner* v. *U. S.* (322 U. S. 665); *Lehmann* v. *Acheson* (206 F. 2d 592, 3C); *Galena Oaks Corp.* v. *Scofield* (—— F. 2d ——, 5C, Dec. 29, 1954, as yet unreported).

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and

hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20 (11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an

"agricultural commodity," we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC–C–1605, *East Texas Motor Freight Lines, Inc., et al.* v. *Frozen Food Express,* is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January 1955.

(S) JOSEPH C. HUTCHESON, Jr.,
Chief Judge, Fifth Circuit,

(S) BEN C. CONNALLY,
United States District Judge,

(S) T. M. KENNERLY,
United States District Judge,
Concurring in Part and Dissenting in Part.

KENNERLY, *District Judge:* Concurring in part and dissenting in part.

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303 (b) should be given a broad and liberal construction, and that Section

303 (b) (6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the *Kroblin* case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

(S) T. M. KENNERLY,
Judge.

APPENDIX B

In the United States District Court, Southern District of Texas, Houston Division

Civil Action No. 8285

FROZEN FOOD EXPRESS, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321–2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

Ordered, adjudged, and decreed that the relief prayed for by the plaintiffs, including the Secre-

tary of Agriculture as an intervening plaintiff, be, and the same hereby is, denied, and their complaints be, and the same hereby are, dismissed.

This the 23d day of February 1955.

(S) JOSEPH C. HUTCHESON, Jr.,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

(S) THOMAS M. KENNERLY,
United States District Judge.

(S) BEN C. CONNALLY,
United States District Judge.

APPENDIX C

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 13TH DAY OF APRIL, A. D. 1951

No. MC–C–968

DETERMINATION OF EXEMPTED AGRICULTURAL COMMODITIES

No. MC–107669

NORMAN E. HARWOOD CONTRACT CARRIER APPLICATION

It appearing, That by order entered in No. MC–C–968, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act;

It further appearing, That on December 16, 1947, the Commission, division 5, entered its report, 47 M. C. C. 597, and order in No. MC–107669 granting applicant, Norman E. Harwood, a permit authorizing certain operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, and otherwise denying the application;

It further appearing, That upon consideration of petitions filed by the Secretary of Agriculture and the Atlantic Commission Co., Inc., and others, the Commission reopened the proceeding in No. MC–107669 for further hearing on a consolidated record with No. MC–C–968;

And it further appearing, That full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed its report on oral argument herein containing its findings of fact and conclusions thereon, which report and the report and order of December 16, 1947, in No. MC–107669, are hereby referred to and made a part hereof:

It is ordered, That the proceeding in No. MC–C–968 be, and it is hereby discontinued.

It is further ordered, That the order of December 16, 1947, in No. MC–107669, be, and it is hereby, vacated and set aside.

And it is further ordered, That the application in No. MC–107669, be, and it is hereby, denied.

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1948